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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling	)	WT Docket No. 99-263
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JOINT COMMENTS OF AT&T CORP., BELLSOUTH CELLULAR CORP. AND AB CELLULAR HOLDING, LLC

S. Kendall Butterworth
BellSouth Cellular Corp.
1100 Peachtree Street, N.E.
Suite 910
Atlanta, Georgia 30309
(404) 249-0919

David G. Frolio
BellSouth D.C., Inc.
1133 21st Street, N.W.
Suite 900
Washington D.C. 20036
(202) 463-4182

Mark C. Rosenblum
Edward R. Barillari
AT&T Corp.
Room 3245H1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4617

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 223-9222

Howard J. Symons
Sara F. Seidman
A. Sheba Chacko
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY, & POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

September 10, 1999

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AT&T Corp., BellSouth Cellular Corp., and AB Cellular Holding, LLC[1/] ("Joint Commenters") hereby submit their comments in response to the Petition for a Declaratory Ruling ("Petition") filed by the Wireless Consumers Alliance, Inc. ("WCA") in the above-captioned proceeding. WCA seeks a broad ruling that neither the Communications Act of 1934 nor the FCC's rules can ever preempt a state court from awarding monetary relief against CMRS providers for violations of state consumer protection laws, or in connection with contract disputes or tort actions.

WCA's Petition is grossly overbroad. In fact, the litigation that gave rise to the Petition presents only the narrow question of whether a state court can order restitution in connection with a claim under state consumer protection laws. As demonstrated below, restitution in the context of WCA's claims would be nothing more than judicial rate setting, which is clearly preempted by Section 332(c)(3)(A) of the Communications Act. The FCC should reject WCA's request for a blanket ruling, deny the Petition, and declare instead that an award of monetary

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[1/] AB Cellular Holding, LLC ("AB Cellular") is the entity owned by AT&T and BellSouth that provides cellular service in Los Angeles of the name of AT&T Wireless Services. AB Cellular was formerly known as Los Angeles Cellular Telephone Company, or "LA Cellular."

relief by a state court against a wireless carrier that would require a court to inquire into the reasonableness of the carrier's rates is prohibited by Section 332 of the Communications Act.

INTRODUCTION AND SUMMARY

WCA's Petition stems from a lawsuit filed in California state court that has been styled as a class action by WCA and other plaintiffs.[2/] The plaintiffs in LA Cellular initially alleged that the marketing and promotional materials of Los Angeles Cellular Telephone Company ("LA Cellular") were misleading because the service provided was allegedly not coextensive with the coverage map showing LA Cellular's "reliable service area."[3/] The plaintiffs claimed that they paid too much for cellular service because the service was of a lesser quality than represented by LA Cellular in its coverage map, and they asked the state court to remedy this putative overcharge by effectively ordering LA Cellular to reduce its rates retroactively.[4/] The trial court dismissed these claims concluding that they raised issues of federal preemption.

Subsequently the plaintiffs filed an amended complaint from which they excised any reference to LA Cellular's coverage maps, its "reliable service area," and arguments pertaining to

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[2/] Marsha Spielholz, Deborah Petcov, and Wireless Consumers Alliance, Inc. v. Los Angeles Cellular Telephone Co. et. al., Superior Court of the State of California, County of Los Angeles, Case No. BC186787 ("LA Cellular"). The Action was first filed in November 1997, although never served on LA Cellular or any of its co-defendants. That case was dismissed and a second identical action was filed on February 27, 1998 (Case No. BC186787). The plaintiffs filed their First Amended Class Action Complaint on June 29, 1998.

[3/] First Amended Complaint filed at ¶¶ 28, 29, 30, 31, 34 & 60, Spielholz v. Los Angeles Cellular Telephone Co., Superior Court of the State of California, County of Los Angeles, Case No. BC186787.

[4/] Id. The plaintiffs also alleged that the rates charged by LA Cellular for service on 0.6-watt portable phones were excessive because, according to plaintiffs, LA Cellular's system was designed to provide coverage to 3-watt phones, thereby shortchanging subscribers with only 0.6-watt phones. Id. at ¶¶ 2-4.

any differential in the quality of service.[5/] The nature of the relief sought – restitution to the plaintiffs in the amount of the difference between LA Cellular's rates and the allegedly lower value of LA Cellular's service – did not change. The trial court again concluded that the monetary relief sought by the plaintiffs would require the court to set rates for a CMRS provider's services in violation of Section 332(c)(3)(A) of the Communications Act.[6/]

In its Petition, WCA repeatedly asks the Commission not to delve into the facts of the LA Cellular case.[7/] Rather, WCA seeks a broad declaratory ruling that would allow the LA Cellular plaintiffs, and any other customer dissatisfied with wireless service rates, to seek monetary relief in a state court so long as they characterize their claims as violations of state contract, tort, or consumer protection laws. While such a sweeping ruling would solve the WCA's apparent need to dispose of inconvenient facts in its specific case, the determination of whether a state court award of monetary relief against a CMRS provider constitutes impermissible retroactive ratemaking is necessarily specific to the facts of each case.

Indeed, in the particular case that gives rise to the Petition, the plaintiffs are seeking state rate regulation through the guise of a consumer fraud action. The gravamen of their case is that

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[5/] See Second Amended Class Action Complaint filed December 11, 1998, Spielholz v. Los Angeles Cellular Telephone Co., Superior Court of the State of California, County of Los Angeles, Case No. BC186787.

[6/] Section 332(c)(3)(A) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." 47 U.S.C. § 332(c)(3)(A). (emphasis added).

[7/] "[T]he Commission can issue the requested ruling without delving into the facts of the Petitioner's case pending before the California courts." Petition at ii. "The FCC can issue the requested ruling without delving into the facts of any specific case . . . ." Petition at 3. "Petitioner is not seeking the Commission's opinion with respect to any facts at issue before state trial court." Petition at 5. "[T]he ruling which [Petitioner] presently seeks from the Commission does not call for the Commission to provide an opinion concerning the facts of the case which has given rise to Petitioner's request herein." Petition at 6.

they have been overcharged for the service provided by LA Cellular. While carefully couched in the language of a misrepresentation claim, the plaintiffs clearly seek a monetary remedy – damages, restitution or disgorgement – that would make them "whole" and require LA Cellular to pay back alleged excess profits earned as a result of the claimed excessive rates.[8/]

Notwithstanding WCA's obviously self-serving contention, the Commission cannot simply ignore the underlying basis for plaintiffs' state court claims and make a blanket declaration that state court monetary awards "cannot impinge upon rates" in any case, and that such awards "no matter their form" cannot violate the preemption terms of Section 332(c)(3)(A) of the Act. To the contrary, granting the monetary relief demanded by the plaintiffs in LA Cellular and dozens of other state court cases would place the courts in the position of evaluating the reasonableness of the CMRS carriers' rates and resetting the rates as they deem appropriate. The language of Section 332(c)(3)(A), its legislative history, and the bulk of judicial precedent, demonstrate that involvement by state courts in wireless rate regulation is clearly prohibited.

Declining to issue the broad ruling requested by WCA would not, as WCA asserts, leave consumers with no remedy for fraudulent behavior by CMRS providers. State public utility commissions and state courts continue to play an important role in ensuring that wireless carriers abide by consumer protection laws and regulations. The only thing that a state court may not do is award monetary relief against a CMRS provider when such an award amounts to rate regulation. Moreover, the FCC is not powerless to enjoin, or award monetary relief for, practices by carriers that are deemed to be fraudulent or misleading. Through rulemaking proceedings, the

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[8/] See, e.g., Second Amended Complaint at ¶¶ 38 & 41; Prayer for Relief, Second Amended Complaint, at ¶ 4.

Commission often has taken action to stem perceived abuses, and it has full enforcement authority in individual adjudications.

Rather than promote consumer welfare, WCA's proposed approach would undermine the public interest. The Commission has consistently found that setting rates through market forces, rather than regulation, is the best way to enhance competition, lower prices, and promote the deployment of CMRS facilities. Carriers have responded to the Commission's "hands off" approach by establishing innovative rate plans, including regional and national plans that offer service in broad calling areas. In the competitive environment fostered by the Commission, consumers dissatisfied with service from one carrier can "vote with their dollars" and take their business to another.

WCA would have the Commission reverse this trend by authorizing 50 or more state courts to reset market-driven wireless rates retroactively in response to "consumer protection" lawsuits claiming that subscribers received poor service or lower quality than allegedly was promised. This is not the result intended by Congress, nor does it comport with the Commission's rulings. Rather than sponsor the new avenue of state court rate regulation advocated by WCA, the Commission should state unequivocally that if awarding monetary relief against a CMRS provider would enmesh a state court in a determination of the reasonableness of a CMRS carrier's rates, as is the case in LA Cellular, such relief is prohibited by Section 332(c)(3)(A).

I. THE FACTS OF THE COURT CASE AND THE NATURE OF THE RELIEF SOUGHT ARE CRUCIAL IN DETERMINING WHETHER A STATE COURT IS ACTING WITHIN THE SCOPE OF ITS AUTHORITY

In its petition, WCA asks the Commission to declare that any claim for monetary relief brought in state court against a CMRS provider is consistent with Section 332(c)(3)(A) of the Communications Act so long as such claim is based on an alleged violation of state consumer protection, tort, or contract law. WCA contends that its requested ruling "concerns principles of law which can be annunciated by the Commission without reference to the specific facts of any particular case that may be brought before a state court."[9/]

The Commission cannot, however, ignore the relevant facts, including the nature of the relief sought by plaintiffs, on a case-by-case basis. In LA Cellular itself, the requested relief would have required the trial court to engage in impermissible rate regulation. As noted above, to provide the plaintiffs in LA Cellular with a monetary remedy that would make them "whole," the court would have had to set a reasonable rate corresponding to the value of wireless services received by the plaintiffs, and refund the difference between the market rate charged to the plaintiffs and the "reasonable" rate(s) set by the court.

Equally troubling is WCA's assertion that the Commission should, in advance and in the abstract, approve of every claim for monetary relief sought in any state court case, current or future. Rather than provide useful guidance to both state courts and litigants regarding the intent of Congress in enacting Section 332, such a ruling would invite deceptive pleading by parties who are dissatisfied with CMRS rates. It would also inevitably spawn numerous impermissible state law claims against wireless carriers. As it is, since 1995, more than 45 lawsuits have been

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9/ Petition at 6.

filed against wireless providers across the country attacking how wireless calls are charged.[10/] These lawsuits seek judicial intervention on rates for CMRS service on a statewide, regionwide, and even nationwide basis going back as many as six years.[11/]

An overbroad ruling from the Commission that monetary awards by state courts are never preempted would lead to balkanized CMRS rate regulation – the very result that Congress sought to avoid by enacting Section 332(c)(3)(A).[12/] The Commission should not nullify its own jurisdiction by inviting state-by-state determinations of what constitutes reasonable CMRS rates. Instead of issuing WCA's requested ruling, the Commission should examine closely the facts of LA Cellular and limit its ruling to whether that court was correct in concluding that Section 332(c) barred it from evaluating LA Cellular's rates and determining how much to refund to the plaintiffs.

II. STATE JUDICIAL RATEMAKING IS PROHIBITED BY SECTION 332(c)(3)(A) OF THE COMMUNICATIONS ACT

In LA Cellular, the plaintiffs alleged that they received "substantially less service than that for which they contracted . . ."[13/] and therefore sought monetary relief. As a matter of a restitutionary remedy, the only basis for determining the extent of the plaintiffs' loss would be for the court to evaluate how much excess revenue LA Cellular received as a result of charging

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[10/] See List of Lawsuits Attacking the Manner in Which CMRS Carriers Compute Rates, attached as Exhibit 1.

[11/] See, e.g., Tenore v. AT&T Wireless Servs., Inc., 962 P.2d 104, 105-06 (Wash. 1998) (regionwide class); DeCastro v. AWACS, Inc., 935 F. Supp. 541, appeal dismissed, 940 F. Supp. 692 (D.N.J. 1996) (statewide class); Carroll v. Cellco Partnership, Docket Nos. AM-001316-96T3, AM-001303-96T3 (N.J. Super. Ct. App. Div., June 25, 1997) (nationwide case).

[12/] Cf. Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress . . . .").

rates for service that was quantitatively and qualitatively less than that for which the plaintiffs believed they had contracted. This calculated delta between (1) what was paid and (2) what plaintiffs allegedly should have paid had there not been the claimed misrepresentations or nondisclosures would be the amount that LA Cellular would "give back" from the charges already collected. As the plain language of Section 332(c)(3)(A) and its legislative history indicate, and as numerous courts have explained, such a remedy would place a court squarely – and impermissibly – in the position of evaluating the reasonableness of the rates charged by LA Cellular for its service.

A. The Plain Language of Section 332, its Legislative History, and Judicial Precedent Prohibit all Actions by a State that Constitute Regulation of CMRS Rates

WCA argues that Section 332(c)(3)(A) of the Communications Act is intended to preempt only conventional rate setting by state and local governments. WCA extrapolates that because wireless telephone service "prices" are market-determined, there are no regulated rates for the monetary awards to impinge upon, and that monetary awards therefore cannot set rates.[14/] WCA is wrong. It is clear from both the express language of Section 332 and its legislative history that Congress intended to preempt all state regulation of CMRS rates, except as otherwise prescribed by Congress.

Section 332(c)(3)(A) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ."[15/] The only method by which a state may regulate CMRS rates is by petitioning the Commission for

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[13/] Second Amended Complaint at ¶ 33.

[14/] Petition at 12-13.

[15/] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

authority. If the Commission finds that the conditions in Section 332(c)(3)(A)(i) or (ii) exist,[16/] the Commission is obligated to grant the state authority to regulate CMRS rates. To date, the Commission has declined to grant any such petition, finding that the filing states were not able to provide proof that market conditions did not adequately protect subscribers from unjust and unreasonable rates.[17/]

It is equally clear from the legislative history that Congress enacted this provision to promote the development of the wireless industry by precluding state regulation of rates that would disrupt the environment of national regulatory uniformity, stability, and predictability desired by Congress. Congress found that a "uniform national policy is necessary and in the public interest" to "promote competition for wireless services" and to avoid "State regulation [that might] be a barrier to the development of competition in this market"[18/] Preemption of state

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[16/] Sections 332(c)(3)(A)(i) and (ii) provide that the Commission shall grant a state authority to regulate CMRS rates only if the Commission finds that the following conditions exist:

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

[17/] See, e.g., Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, Report and Order, 10 FCC Rcd 7486, 7499 (1995) ("California CMRS Order"); Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order, 10 FCC Rcd 7025 (1995) ("Connecticut CMRS Order"), aff'd sub nom., Connecticut Dept. of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

[18/] H.R. Rep. No. 103-213 at 480-81 (1993). See also H.R. Rep. No. 103-111, at 260 (1993) (federal legislation is designed to encourage further investment in wireless infrastructure). The Commission also concluded that regulation at the federal level was critical to the growth of wireless services. See Connecticut CMRS Order at 7031-32 (investment in wireless infrastructure will be maximized by "establishing a stable, predictable regulatory environment that facilitates prudent business planning"); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1421 (1994) (regulation of CMRS must be "perceived by the investment community as a positive factor that creates incentives for investment in the

rate regulation was deemed critical to the growth and development of the wireless industry because Congress sought to avoid conflicting, state-by-state ratemaking.[19/]

WCA's assertion that an award of monetary relief by a state court cannot and does not constitute state rate making is also inconsistent with the decisions of most courts that have been presented with this issue.[20/] As the Supreme Court has explained:

> [R]egulation can be as effectively exerted though an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.[21/]

Applying this principle, the Federal District Court in Comcast Cellular concluded that "[i]t is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like legislative or regulatory action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme."[22/] Under notably similar

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development of valuable communication services-rather than as a burden standing in the way of entrepreneurial opportunities").

[19/] See California CMRS Order at 7499. For these reasons, there is no merit to WCA's claim that a CMRS carrier is no different from a dry cleaner and that a state court is no more preempted from hearing a state law claim involving monetary relief against a CMRS provider than it is prohibited from hearing a similar claim against a dry cleaner. WCA ignores the critical difference between these two situations, namely the existence of a statute that expressly prohibits state regulation of CMRS rates. 47 U.S.C. § 332(c)(3)(A). To the knowledge of Joint Commenters, there is no similar statutory prohibition against state regulation of dry cleaning rates. Therefore, while any award of monetary relief against a CMRS carrier that enmeshes a state court in regulation of CMRS rates is preempted by Section 332, an award of monetary relief in the dry cleaning context would be perfectly lawful.

[20/] "[S]tate courts that issue monetary awards, no matter their form, are not enmeshed in acts proscribed by Section 332(c)(3)(A) of the Communications Act." Petition at 13.

[21/] San Diego Building Trades Council v. Garman, 359 U.S. 236, 247 (1959). See also Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981) (holding that damage actions are disguised retroactive rate adjustments); BMW of North America, Inc. v. Gore, 517 U.S. 559, 572 n. 17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (quoting Ex Parte Virginia, 100 U.S. 339, 347 (1880)) ("A State acts by its legislative, executive, or its judicial authorities.").

[22/] In re Comcast Cellular Telecom. Litigation, 949 F. Supp. 1193, 1201 n. 2 (E.D. Pa. 1996).

facts to LA Cellular, that court held that the plaintiffs' challenge to the carrier's practice regarding the measurement of call length was preempted by Section 332(c)(3)(A). The court stated that the plaintiffs' claims of breach of the implied duty of good faith and fair dealing, unjust enrichment, and for restitution:

> attack [] the reasonableness of the method by which Comcast calculates the length and consequently, the cost of a cellular telephone call. As such, Plaintiff's claims present a direct challenge to the calculation of the rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a CMRS provider, something it is explicitly prohibited from doing.[23/]

Similarly, in Marcus v. AT&T, the Court of Appeals for the Second Circuit held that, where rate-making authority is the exclusive preserve of the FCC, appellants' state law claim for monetary relief for the telephone company's allegedly fraudulent behavior was barred because judicial rate setting and "any judicial action which undermines agency rate-making authority" was precluded.[24/] A federal district court in New York previously reached the same conclusion in Wegoland Ltd. v. NYNEX Corp. and dismissed plaintiffs' action for common law fraud.[25/] In that case, the court found that, in calculating monetary relief, the court would have had to determine the reasonable rate absent the carrier's fraud, which is a function the Communications Act reserves exclusively to the Commission. See also Simons v. GTE Mobilnet, Inc., No. H-95-

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[23/] Id. at 1201.

[24/] 138 F.3d 46, 61 (2d Cir. 1998).

[25/] 806 F. Supp. 1112 (S.D.N.Y. 1992), aff'd, 27 F.3d 17 (2d Cir. 1994). While in Marcus, 138 F.2d 46(2d Cir. 1998) and Wegoland, 806 F. Supp. 1112 (S.D.N.Y. 1992), the prohibition against judicial rate regulation stems from the Filed Rate doctrine, the courts' determinations of what constitutes judicial ratemaking are equally applicable to a determination of what constitutes impermissible judicial regulation of CMRS rates.

5169 (S. D. Tex. Apr. 11, 1996) ("all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A)").

Numerous state courts have similarly recognized the federally-imposed limit on their authority to award monetary relief in cases in which states are statutorily prohibited from regulating rates.[26/] For example, in Day v. AT&T,[27/] a California Court of Appeals held that if the relief to be granted, including restitution relief, "would enmesh the court in the rate-setting process," the court could not grant such an award.[28/] The court explained that "restoration" can

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[26/] Most of the cases relied upon by WCA have nothing to do with the issue of whether claims for monetary relief would involve impermissible rate-setting, but rather deal with the procedural question of whether a plaintiff's consumer protection or fraud claims can be removed to federal court because they are "completely preempted." See DeCastro v. AWACS, 935 F. Supp. 541 (D.N.J. 1994); Sanderson v. AWACS, 958 F. Supp. 947 (D. Del. 1987); Bauchelle v. AT&T Corp., 989 F. Supp. 636 (D.N.J. 1997); Weinberg v. Sprint Corp., 165 F.R.D. 431 (D.N.J. 1996); Bennett v. Altel Local Communications, 1996 WL 1054301 (M.D. Ala. 1996). For these courts to find "complete preemption" that would justify removal jurisdiction, they would have had to find that the Communications Act of 1934 creates a federal cause of action and provides a clear indication of congressional intent to permit removal despite the pleading of essentially state law claims. See Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R.Co., 858 F.2d 936, 942 (3d Cir. 1988). The DeCastro, Sanderson, Bennett, Weinberg and Bauchelle courts were unable to find that the necessary stringent requirements for removal had been met. The holdings of these cases are therefore consistent with the trial court's ruling in WCA that the plaintiffs' claims for injunctive and declaratory relief could proceed in state court and with the position of Joint Commenters that only claims that would involve a court in regulating CMRS rates are preempted by Section 332. See DeCastro, 935 F. Supp. at 555 ("The defendant is free to argue in state court that the class claims . . . are preempted by federal law"). The only contrary decision cited by WCA is Tenore v. AT&T Wireless Services, Inc., 962 P.2d 104 (Wash. 1998), cert. denied, 119 S. Ct. 1096 (1999). While in Joint Commenters' view, Tenore was wrongly decided, it is distinguishable from LA Cellular. The Tenore court concluded that the plaintiffs were challenging only the disclosure of a billing practice rather than the reasonableness of the underlying rate. Id. at 112 (plaintiffs "do not contest the reasonableness or legality of the underlying rates"). In LA Cellular, by contrast, the court did not, and could not, find that the case was simply about disclosure. Indeed, to adjudicate any of the plaintiffs' claims, the court would have had to decide what rate would have been reasonable in light of LA Cellular's allegedly poor service.

[27/] Day v. AT&T, 63 Cal. App. 4th 325, 337 (Cal. App. 1998). Day involved a wireline carrier and the Filed Rate doctrine, but as discussed infra at Section II.E, the analysis is no different than the preemption question under Section 332.

[28/] According to the Day court, the word "restore" means "to give back, to make return or restitution" of anything previously taken away or lost. 63 Cal. App. 4th at 338. The court summarized the requirements for restitution under California law as including "two separate components." The offending

operate "only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice."[29/] Thus, before a court can grant restitution as a remedy, there must be some "measurable loss," without which imposition of restitution as a monetary sanction would be inappropriate. In the Day court's words, the amount being restored must be "objectively measurable as that amount which the defendant would not have received but for the unfairly competitive practice."[30/] The court concluded, therefore, that under the theories of recovery that were advanced by the plaintiffs and that were permissible under California law, the court could not grant the requested relief without involving itself in prohibited rate-setting activity.[31/]

The recent history of the wireless industry confirms the success of the uniform national policy envisioned by Congress and implemented by the Commission, including forbearance from rate regulation. As the Commission has recognized, numerous competitors currently provide commercial mobile services. "There are now at least five mobile telephone providers in each of the 35 largest Basic Trading Areas (BTAs), and at least three mobile telephone providers in 97 of

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party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep." Id. at 340.

[29/] Id. at 339 (emphasis added).

[30/] Id.

[31/] Other state courts have reached a similar conclusion. See Ball v. GTE Mobilnet of California Ltd., No. 98AS03811 (Cal. Super. Ct. (Sacramento County) Nov. 17, 1998) (dismissing incremental billing and related claims under Section 332 because they challenged the method of calculating the length of and rate for wireless calls); Rogers v. Westel-Indianapolis Co., No 49D03-9602-CP-0295 (Marion Super. Ct. (Ind.) July 1, 1996) ("remedy requested by Plaintiff will in fact require a change of rates and therefore this Court does not have jurisdiction"); Powers v. AirTouch Cellular, No. N71816 (Cal. Super. Ct. (San Diego County) Oct. 6, 1997) (plaintiffs' claims based on inadequate disclosure are preempted because plaintiffs' "allegations constitute direct challenges to the calculation of the rates charge[d] by defendant AirTouch for cellular telephone service").

the 100 largest BTAs in the United States."[32/] More than 231.6 million Americans live in markets in which there are at least three and as many as seven wireless providers.[33/] This robust competition has caused mobile telephone prices to fall "substantially" since 1998,[34/] with new entrants expected to take half of the industry's net new subscribers this year.[35/] According to the Commission, subscribership of mobile telephony services jumped by 25 percent in 1998, increasing the total number of subscribers reported from 55.3 million in 1997 to 69.2 million in 1998, thereby "bringing the benefits of mobility to an ever-increasing segment of the country."[36/]

The Commission reports that one of the most dramatic changes in the mobile telephone industry "has been the widespread adoption of what are often referred to as 'digital-one-rate' ('DOR') price plans."[37/] Digital-one-rate plans have promoted price competition, increased rates of subscribership, innovations in service offerings, and exerted downward pressure on roaming rates.[38/] These innovative rate plans cannot exist, however, in a fragmented regime in which a multiplicity of state court awards govern a CMRS carrier's prices from market to market. If dozens of state courts were to arrive at different conclusions about what rates would have been reasonable for a national wireless provider to charge absent that carrier's allegedly deceptive national advertising campaign, one wireless provider could be subject to hundreds of different

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[32/] See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Fourth Report, FCC 99-136, at 6 (rel. June 24, 1999) ("Fourth Report").

[33/] CTIA's Who's Where in Wireless: 1999 (Cellular Telecommunications Industry Assn. 1999), at 2.

[34/] Fourth Report at 21.

[35/] Id. at 24.

[36/] Id. at 5, 8.

[37/] Id. at 11-12.

[38/] Id. at 11-13, 23.

"reasonable" rates throughout the United States. This result would be utterly contrary to Congress' express desire to avoid subjecting CMRS carriers to a balkanized state-by-state rate regulatory scheme.

B. Claims of Inadequate Service and Coverage Gaps are, in Essence, Claims about the Rates CMRS Providers Charge Customers

In an attempt to avoid the conclusion reached by the trial court and many other courts, WCA claims that the LA Cellular litigation only involves regulation of "the other terms and conditions" of wireless service,[39/] which is permitted by Section 332(c)(3)(A). This argument fails because, as the Supreme Court itself has recognized, "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."[40/]

In Central Office Telephone, long distance resellers alleged that AT&T violated state contract and tort law by promising, but never providing, various service and billing options. The Supreme Court held that both claims fell within the exclusive preserve of the FCC, reversing the Court of Appeal's holding that the claims did not involve rates or rate setting. According to the Supreme Court, "rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached."[41/] The concept of what constitutes "rates" must be defined sufficiently broadly to ensure that states do not engage in backdoor ratemaking under the guise of regulating other terms and conditions.[42/]

39/ See Petition at 13.

40/ AT&T Co. v. Central Office Tel., Inc., 524 U.S. 214, 118 S. Ct. 1956, 1963 (1998) ("Central Office Telephone").

41/ Id. at 1963.

42/ Id.

Consistent with the reasoning of Central Office Telephone, the term "rates" under Section 332(c)(3)(A) includes not only the numbers and figures in a service contract, but all aspects of CMRS service that give value and meaning to the numbers and figures.[43/] Telling a subscriber that he will be charged $1.00 has no meaning on its own, but telling a subscriber that he will be charged $1.00 per minute to call New York from Washington D.C. between 8:00 a.m. and 5:00 p.m., Monday to Friday, puts meaning into the stated charge. The rate necessarily consists of the charge and aspects of the service that contribute to where the charge is set.

This definition comports with the plain language of Section 332 and the emphasis in Section 332 that states do not have any authority over CMRS rates.[44/] This definition also best fulfills Congress' expressed intent that to encourage the development of wireless services, CMRS carriers should not be subject to multiple and conflicting state regimes governing CMRS rates.[45/]

In numerous cases brought in state courts challenging CMRS practices, the plaintiffs characterized the defendants' conduct as violations of state consumer protection laws, such as false and deceptive advertising. Nevertheless, the courts found that such claims were, in

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[43/] See id.

[44/] The California Public Utilities Commission has in fact recognized this point. See California Wireless Resellers Ass'n v. L.A. Cellular Tel.Co., Case 98006-055 (CPUC Nov. 5, 1998) (CPUC lacks jurisdiction to order defendant to provide service to reseller at wholesale terms because CPUC cannot require sale at wholesale terms without reference to wholesale rates, which it is precluded from establishing).

[45/] While the legislative history of Section 332 notes that states may regulate certain other terms and conditions of CMRS service such as "customer billing information and practices," "billing disputes" and "other consumer protection matters," this authority is not an invitation for states to engage in backdoor rate making. Cf. H.R. Rep. No. 103-111, 103rd Congress, 1st Sess. 211, 261. States remain preempted from taking any action that would involve them in setting CMRS rates.

actuality, challenges to the rates charged by CMRS providers.[46/] In Comcast Cellular, for instance, the court concluded that "the driving force behind the [plaintiffs'] allegations is a desire to impose restrictions not only upon the way in which Comcast advertises its rates but also upon the rates which Comcast may charge for mobile telephone services."[47/] In Powers, the court concluded from the complaint that the plaintiff's allegation focused not on a failure to disclose charges, but on the reasonableness of the charges themselves.[48/]

Similarly, the allegations made in LA Cellular plainly and directly attack the reasonableness of LA Cellular's rates. The plaintiffs initially claimed that subscribers using 0.6-watt hand-held phones should be charged a lower rate than subscribers using 3.0-watt car phones because users of lower-power phones allegedly experienced poorer service.[49/] Other requests for relief were aimed not at enjoining the misleading behavior complained of, but at LA Cellular's collection and calculation of charges. The plaintiffs sought to enjoin LA Cellular from "collecting the existing monthly fee and usage fee from portable 0.6-watt low-powered cellular phone users"[50/] and from "rounding dropped calls up to the next highest minute."[51/] Although the LA Cellular plaintiffs subsequently dropped the overt references to L.A. Cellular's rates and charges, the trial court correctly saw through the plaintiffs' ruse and concluded that the plaintiffs

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[46/] See discussion supra Section II.A.

[47/] 949 F. Supp. at 1201. This was evident to the court because plaintiffs had sought an injunction preventing Comcast from charging customers during the call-initiation period. Id.

[48/] Powers, No. N71816 (Cal. Super. Ct. (San Diego County) (Oct. 6, 1997). The plaintiff in that case had alleged that it had been damaged by the defendant's "methods of determining or calculating the quantity of airtime usage" as a result of which plaintiff had had "to pay for larger quantities of cellular telephone service than . . . actually used."

[49/] First Amended Complaint at ¶¶ 18, 29, 30, 35, 43, 50; First Amended Complaint, Prayer for Relief at ¶3.

[50/] First Amended Complaint, Prayer for Relief at ¶ 3.

were seeking a rebate of rates for inadequate service through a monetary award. The trial court recognized – and the plaintiffs acknowledged – that the plaintiffs' demand for monetary relief would require the court to set a reasonable rate for the CMRS services.[52/]

Clearly, a plaintiff's own characterization of a particular case cannot serve as a basis to determine whether the remedy sought would force a court to engage in impermissible ratemaking. That would enable plaintiffs to undermine the federal regulatory scheme for CMRS simply through clever pleading in state court. Rather, to the extent such claims challenge, directly or indirectly, the reasonableness of the rates charged by CMRS providers, Section 332(c)(3)(A) preempts a state court from considering or granting such relief.

C. The Public is Adequately Protected from Fraudulent Practices by CMRS Providers

Contrary to WCA's contention, Section 332's preemption of states from the regulation of CMRS rates does not deprive states of asserting their role of protecting consumers from unfair, deceptive, misleading or fraudulent practices by CMRS carriers. State courts are fully authorized

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[51/] Complaint at ¶ 36

[52/] See following exchange between the presiding judge, Judge Mortimer, Los Angeles County Superior Court, and Plaintiffs' counsel:

THE COURT: Well, enlighten me. You say you don't have a damage model worked out at this point, but if you are asking for dollar damages, aren't they going to be based upon – based upon a false advertising claim? Aren't they going to be based on the fact that the subscribers did not get what they thought they were getting and the service was not worth as much as it was advertised to be worth?

COUNSEL FOR PLAINTIFFS: In some way, yes, Your Honor, but the emphasis I think will be on what the – you are right. I think that the class members' damages will be measured by what they lost, what they lost, and in order to determine that, you have to look at what they paid. I think that much is true. But I don't think that would enmesh the Court in rate making, and I think that's what every other court in this particular context against cellular telephone companies has concluded.

THE COURT: Well, it seems like another way of saying that they were overcharged and didn't get the services they thought they were getting, and in a way, that's then changing the rates or regulating the rates, is it not?

R.T. 14-15 (Feb. 11, 1999).

to adjudicate claims and grant any relief so long as it does not involve a court in regulating CMRS rates. States also remain able to regulate the other terms and conditions governing CMRS carriers' provision of service to residents of their states. States may even seek authority to regulate CMRS rates as specified in Section 332.

Nor is there any merit to WCA's claim that unless plaintiffs are permitted to obtain monetary relief against CMRS carriers in state consumer protection actions, there will be a void "between the zones of permissible federal and state regulation [of] the wireless telecommunications industry."[53/] On the contrary, when Congress revised Section 332 to preempt state rate regulation, it also amended Section 2(b) to give the FCC authority to address all disputes concerning wireless rates, charges, practices, and classifications.[54/] Aggrieved wireless consumers therefore may seek redress by filing a complaint with the FCC.[55/] The Commission will review the complaint pursuant to the standards set forth in Sections 201 and 202 of the Communications Act,[56/] and may award damages to injured consumers as appropriate.[57/]

The Commission recently has used its authority under Section 201(b) to prohibit telephone companies from engaging in practices that it considers unjust and unreasonable.[58/]

53/ Petition at 17.

54/ 47 U.S.C. § 152(b) (establishing that the Commission lacks jurisdiction over intrastate communications "[e]xcept as provided in . . . section 332").

55/ 47 U.S.C. § 208.

56/ 47 U.S.C. §§ 201, 202.

57/ See 47 U.S.C. § 209.

58/ In the Matter of Truth-in-Billing and Billing Format, First Report And Order And Further Notice Of Proposed Rulemaking, CC Docket No. 98-170, FCC 99-72, (rel. May 11, 1999) ("Truth-in-Billing"). But see Bauchelle v. AT&T Corp., 989 F. Supp. 636, 645 (D.N.J. 1997), (stating in dicta that,"[t]he

Specifically, in the Truth-in-Billing order, the Commission found that "a carrier's provision of misleading or deceptive billing information . . . is an unjust and unreasonable practice in violation of section 201(b) of the Act."[59/] The Commission's authority under Section 201(b) to promulgate rules prohibiting unlawful behavior with regard to customer billing information is equally applicable to the claims brought by WCA in state court. There is no gap in jurisdiction and there is no reason that parties should not be required to pursue their claims in the proper forum.

D. Section 414 does not Preserve State Law Rights that are Inconsistent with the Communications Act

WCA argues that Section 414 of the Communications Act, commonly referred to as the "savings clause,"[60/] reflects Congress' determination that state law claims should not be subsumed by the Communications Act.[61/] The savings clause, however, lacks the power WCA imbues it with. As the court stated in Comcast, Section 414 "cannot plausibly be read to preserve state law claims which directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act."[62/] Indeed, the Supreme Court has held that Section 414 preserves only those state law rights that are not inconsistent with Communications

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[Communications Act] does not impose any duty on common carriers to be truthful in their promotional practices").

[59/] See Truth-in-Billing at ¶ 24.

[60/] 47 U.S.C. § 414 states that, "[n]othing in the chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

[61/] Petition at 14-16.

[62/] In re Comcast, 949 F. Supp. at 1205.

Act.[63] Other courts have agreed, stating that "interpretations of savings clauses in common carrier statutes . . . that would empower state courts to gut the federal regulatory scheme" must be rejected.[64] Since the claims made by the plaintiffs in LA Cellular conflict directly with the prohibition on state rate regulation in Section 332, Section 414 cannot render these claims lawful.

E. Filed Rate Cases are Relevant Because They Shed Light on Actions that Constitute Rate Setting by a State Court

WCA contends that LA Cellular misled the trial court through references to the "Filed Rate" doctrine and seeks a ruling from the Commission that the doctrine has no bearing upon, and does not preclude a state court from awarding monetary relief against, wireless telephone companies. Contrary to WCA's argument, LA Cellular did not attempt to "inveigle the trial court" by bringing up the Filed Rate Doctrine.[65] LA Cellular knows full well that CMRS carriers are not required to file tariffs, and it made clear to the court that the Filed Rate Doctrine is not directly applicable to the rates set by LA Cellular and other wireless providers. Rather, LA Cellular simply explained to the court that the logic of the Filed Rate cases is directly relevant to what is encompassed within the terms "rates" and "rate-making" and thus relevant to the proper meaning of those terms under Section 332(c)(3)(A).

Under the Filed Rate doctrine, a plaintiff is prevented from "bringing a cause of action . . . whenever either the nondiscrimination strand or the nonjusticiability strand underlying the

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[63] See Central Office Tel., Inc., 524 U.S. 214 (1998) (holding that the savings clause did not preserve plaintiffs' rights under state contract and tort law because these rights were directly inconsistent with the statutory filed-tariff requirements).

[64] Cahnmann v. Sprint, 133 F.3d 484, 488 (7th Cir. 1998), cert. denied, 118 S.Ct. 2368 (1998).

[65] Petition at 19.

doctrine is implicated by the cause of action the plaintiff seeks to pursue."[66] The nonjusticiability strand is aimed at preserving the exclusive role of federal agencies in approving rates for telecommunications services that are "reasonable" by keeping courts out of the rate-making process.[67] Like the nonjusticiability strand of the Filed Rate doctrine, Section 332(c)(3)(A) grants exclusive jurisdiction over CMRS rates to the Commission and federal courts, which are also vested with authority to ensure that these rates are reasonable.[68]

The purpose of Section 332 is identical to the purpose of the nonjusticiability provision of the Filed Rate doctrine. Thus, Filed Rate cases that define when a court ventures into the zone of impermissible ratemaking are equally instructive in determining when a state court has engaged in prohibited regulation of CMRS rates. For this reason, the California Court of Appeal's decision in Day[69] is on point. If a court declines to allow a claim for monetary relief when doing so would amount to state rate regulation in violation of the Filed Rate doctrine, the same facts in the context of a CMRS carrier would certainly produce the same correct result under Section 332(c)(3)(A).

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[66] Marcus 138 F.3d 46, 59 (2d Cir. 1998).

[67] Id. at 58; Wegoland, 27 F.3d at 19. The nondiscrimination strand is aimed at preventing carriers from engaging in price discrimination as between ratepayers. Id.

[68] CMRS ratemaking is a field that is fully and expressly occupied by the federal government, and no state government or court may enter that zone except as permitted by federal law. 47 U.S.C. § 332(c)(3)(A); see Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (when Congress enacts an express preemption statute, the preemptive scope of the statute is governed, first and foremost, "by the express language" of the statute); FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990) (preemption analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose").

[69] 63 Cal App 4th 332 (1998).

CONCLUSION

For the reasons discussed above, the Commission should decline to issue the rulings requested by WCA. Instead, Joint Commenters urge the Commission to declare that a state court is prohibited by Section 332(c)(3)(A) from awarding monetary relief, whether in the form of damages, restitution or otherwise, against a CMRS provider when doing so would require the court to evaluate, set, or inquire into the reasonableness of the CMRS provider's rates.

Respectfully submitted,

BELLSOUTH CELLULAR CORP.

Kendall Butterworth/DF

S. Kendall Butterworth
BellSouth Cellular Corp.
1100 Peachtree Street, N.E., Suite 910
Atlanta, Georgia 30309
(404) 249-0919

David G. Frolio
BellSouth D.C., Inc.
1133 21st Street, N.W., Suite 900
Washington D.C. 20036
(202) 463-4182

AT&T CORP.

Douglas I. Brandon/by SFS

Mark C. Rosenblum
Edward R. Barillari
AT&T Corp.
Room 3245H1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4617

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue N.W., Suite 400
Washington, D.C. 20036
(202) 223-9222

Howard J. Symons
Sara F. Seidman
A. Sheba Chacko
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY, & POPEO, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004
(202) 434-7300
Of Counsel

September 10, 1999
DCDOCS: 156350.8 (3cn208!.doc)

Exhibit 1

List of Lawsuits Attacking the Manner in Which CMRS Carriers Compute Rates

FEDERAL CASES

First Circuit	Casper v. Southwestern Bell Mobile Systems, No. 1:95-cv-12712, U.S.D.C., D. Mass.
	Smilow v. Southwestern Bell Mobile Systems, No. 1:97-cv-10307-REK, U.S.D.C., D. Mass.
Third Circuit	Opalka v. AWACS , Inc., No. 2:96-cv-02418, U.S.D.C., E.D. Pa.
Fifth Circuit	Pepper v. BellSouth Corporation, No. 3:95-CV-851LN, U.S.D.C., S.D. Miss.
	Simons v. GTE Mobilnet, Inc., No. H-95-5169, U.S.D.C., S.D. Tex.
Ninth Circuit	Smith v. Sprint Communications Co., L.P., No. C96-2067-FMS, U.S.D.C., N.D. Cal.
Eleventh Circuit	Brunson v. AT&T Corp., No. 1:96cv01010, U.S.D.C., S.D. Ala.
	Goforth v. Cellular One, Inc., No. 98-289-CIV-FTM-24D, U.S.D.C., M.D. Fla.
	Haughton v. Sprint International Communications Co., No. 7:96cv00230, U.S.D.C., N.D. Ala.
	Ponder v. GTE Mobilnet, No. CV-95-1046-JH, U.S.D.C., S.D. Ala.
	White v. GTE Mobilnet, Inc., No. 8:97cv01859, U.S.D.C., M.D. Fla.

STATE CASES

Alabama	Bennett v. Alltel, No. 96-D-232, Circuit Court of Montgomery County
	Lee v. Contel Cellular of the South, Inc., No. CV-95-004367, Circuit Court of Mobile County
	Mann v. Cellular One, No. CV-95-8579, Circuit Court of Jefferson County
	Moulton v. Alltel, No. 96-D-89-N, Circuit Court of Montgomery County
Arkansas	Maddox v. Alltel Mobile Communications of Arkansas, Inc., No. 98-776, Circuit Court of Saline County
California	Ball v. GTE Mobilnet of California Limited Partnership, No. 98AS03811, California Superior Court, Sacramento County
	California Wireless Resellers Association v. Los Angeles Cellular Telephone Company, No. 98-06-055, California Public Utilities Commission
	Cohen v. AirTouch Cellular Inc. Los Angeles SMSA, No. 972438, California Superior Court, San Francisco County
	Day v. AT&T Corp., Nos. 976391/976617, California Superior Court, San Francisco County
	Landin v. Los Angeles Cellular Telephone Company, No. BC143305, California Superior Court, Los Angeles County
	Nova Cellular West, Inc. v. AirTouch Cellular of San Diego, No. 98-02-036, California Public Utilities Commission

California (Continued)	Powers v. AirTouch Cellular, No. N71816, California Superior Court, North County Branch of San Diego
	Spielholz v. Los Angeles Cellular Telephone Co., No. BC 181317, California Superior Court, Los Angeles County
Delaware	Sanderson v. AWACS, Inc., No. 96C-02-225, Delaware Superior Court, New Castle County
Florida	Goforth v. Cellular One, Inc., No. 98-3623 CA-RWP, Circuit Court of the 20th Judicial District, Lee County
Georgia	Griffin v. AirTouch Cellular of Georgia, No. E55480 Q19/140, Superior Court of Georgia, Fulton County
	Saba v. AirTouch Cellular of Georgia, No. E56074, Superior Court of Georgia, Fulton County
	Sharple v. AirTouch Cellular of Georgia, No. E55480, Superior Court of Georgia, Fulton County
	Smith v. AirTouch Cellular of Georgia, No. E56092, Superior Court of Georgia, Fulton County
Illinois	Penrod v. Southwestern Bell Mobile Systems, Inc., No. 96-L-132, Circuit Court, Third Judicial District, Madison County
Indiana	Rogers v. Westel-Indianapolis Company, No. 49D03-9602-CP-0295, Marion Superior Court
Missouri	Halper v. Sprint, No. CV95-22815, Circuit Court of Jackson County, Missouri and Kansas City
New Jersey	Carroll v. Bell Atlantic, No. AM-001316-96T3, New Jersey Superior Court, Camden County

New Jersey (Continued)	DeCastro v. AWACS, No. L-1715-96, New Jersey Superior Court, Camden County
	Kathuria v. Comcast Cellular One, No. L-5079-95, New Jersey Superior Court, Middlesex County
	Kuhn v. Bell Atlantic, No. AM-001303-96T3, New Jersey Superior Court, Camden County
New York	Porr v. NYNEX Corporation, No. 96-526, Supreme Court of the State of New York, Westchester County
	Roman v. Bell Atlantic NYNEX, No. 604150/96, Supreme Court of the State of New York, New York County
	Tolchin v. Bell Atlantic, No. 17136/97, Supreme Court of the State of New York, Kings County
North Carolina	Mandell v. Bell Atlantic NYNEX Mobile, No. 97-CV5-6528, North Carolina Superior Court, Mecklenburg County
Ohio	Kuns v. 360E Communications Co., No. 96-CV-196, Court of Common Pleas, Erie County, Sandusky
Pennsylvania	Pennsylvania Bancshares v. Motorola, Inc., No. 95-19136, Court of Common Pleas, Montgomery County
Tennessee	Hagy v. Sprint Cellular, No. 6348, Chancery Court for Washington County
Texas	Purkey v. GTE, District Court of Jasper County
	Sommerman v. Dallas SMSA Limited Partnership, No. 96-02150, District Court of Dallas County
	Winston v. GTE Communication Systems Corporation, No. 95-58377, District Court of Harris County

Washington	Hardy v. Claircom Communications Group, Inc., No. 96-2-00574-6, King County Superior Court
	Lair v. GTE Airfone, No. 96-2-00575-4, King County Superior Court
	Lair v. US West New Vector, No. 95-2-26309-7 SEA, King County Superior Court
	Tenore v. AT&T Wireless Services, No. 95-2-27642-3 SEA, King County Superior Court

DCDOCS: 157179.1

CERTIFICATE OF SERVICE

I, Elizabeth A. Crowe, hereby certify that on this 10th day of September 1999, I caused copies of the attached "Joint Comments of AT&T Corp., BellSouth Cellular Corp. and AB Cellular Holdings, LLC" to be sent to the following via hand delivery* or first class mail:

Office of the Secretary*
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Chris Monteith*
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 5-A223
Washington, D.C. 20554

Susan Kimmel*
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 3-A134
Washington, D.C. 20554

James Schlicting*
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 3-C254
Washington, D.C. 20554

Carl B. Hilliard
Wireless Consumers Alliance, Inc.
1246 Stratford Court
Del Mar, CA 92104

ITS, Inc.*
1231 20th Street, N.W.
Washington, D.C. 20036

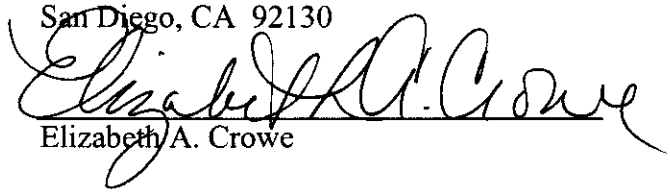
Kenneth E. Hardman
Moir & Hardman
1828 L St., N.W.
Suite 901
Washington, D.C. 20036-5104

Alan M. Mansfield
Patrick W. Daniels
Milberg Weiss Bershad Hynes & Lerach, LLP
600 West Broadway
Suite 1800
San Diego, CA 92101

Reed R. Kathrein
222 Kearney St.
10th Floor
San Francisco, CA 94108

Elizabeth Joan Cabraser
Jacqueline E. Mottek
Michael W. Sobol
Stephen H. Cassidy
Fabrice N. Vincent
Lieff, Cabraser, Heimann & Bernstein, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-9333

Ronald F. Hoffman
Attorney at Law
13070 Survey Point
San Diego, CA 92130



Elizabeth A. Crowe